



BILLING CODE: 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

C-570-968

Aluminum Extrusions from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination Pursuant to Court Decision

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

**SUMMARY:** On October 23, 2015, the United States Court of International Trade (CIT) sustained the Department of Commerce's (the Department's) results of redetermination pursuant to court remand, which recalculated the all-others subsidy rate in the countervailing duty (CVD) investigation of aluminum extrusions from the People's Republic of China (the PRC),<sup>1</sup> pursuant to the CIT's *MacLean-Fogg Remand Order*.<sup>2</sup> Consistent with the clarification in the United States Court of Appeals for the Federal Circuit (CAFC) decision in *Diamond Sawblades*,<sup>3</sup> we are amending the *Final Determination*.

**DATES:** Effective date: November 2, 2015

**FOR FURTHER INFORMATION CONTACT:** Kristen Johnson, AD/CVD Operations, Office III, Enforcement and Compliance, U.S. Department of Commerce, 14<sup>th</sup> Street and Constitution Avenue, NW, Washington, DC 20230; telephone: 202-482-4793.

**SUPPLEMENTARY INFORMATION:** In the *Final Determination*, the Department assigned a total adverse facts available (AFA) rate of 374.14 percent to the three non-cooperating

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<sup>1</sup> See *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011) and *Aluminum Extrusions from the People's Republic of China: Notice of Court Decision Not in Harmony With Final Affirmative Countervailing Duty Determination and Notice of Amended Final Affirmative Countervailing Duty Determination*, 77 FR 74466 (December 14, 2012) (collectively, *Final Determination*).

<sup>2</sup> See *MacLean-Fogg Co. v. United States*, Consol. Court No. 11-00209, Slip Op. 15-85 (CIT August 2015) (*MacLean-Fogg Remand Order*).

<sup>3</sup> See *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

mandatory respondents and calculated company-specific net subsidy rates for two participating voluntary respondents. The Department averaged the rates calculated for the mandatory respondents and applied that rate as the all-others rate, calculated pursuant to section 705(c)(5)(A) of the Tariff Act of 1930 (the Act).<sup>4</sup>

In *MacLean-Fogg I*, the CIT held that the statute was ambiguous concerning whether the Department is required to base the all-others rate on rates calculated for mandatory respondents and therefore the Department was permitted to use the mandatory respondents' rates in calculating the all-others rate provided it did so in a reasonable manner.<sup>5</sup> Nonetheless, the CIT remanded the all-others rate to the Department for reconsideration because the Department failed to articulate a connection between the mandatory respondent rates, based on AFA, and the all-others companies.<sup>6</sup>

In *MacLean-Fogg II*, the CIT held that the Department's preliminary all-others rate in the *Preliminary Determination*<sup>7</sup> was also subject to review under the same reasonableness standard because it had legal effect on the entries made during the interim time period between the issuance of the preliminary and final CVD rates, both as a cash deposit rate and, if an annual review was sought, as a cap on the final rate for those particular entries.<sup>8</sup> Thus, in *MacLean-Fogg II*, the Court held that it would consider the reasonableness of the preliminary rate when it reviewed the Department's remand determination.<sup>9</sup>

In *MacLean-Fogg III*, the CIT considered the Department's remand results.<sup>10</sup> On remand, the Department did not recalculate the all-others rate, but rather, provided data

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<sup>4</sup> See *Final Determination*, 76 FR at 18523, and accompanying Issues and Decision at Comment 9.

<sup>5</sup> See *MacLean-Fogg Co. v. United States*, 836 F. Supp. 2d 1367, 1373-1374 (CIT 2012) (*MacLean-Fogg I*).

<sup>6</sup> *Id.*, at 1376.

<sup>7</sup> See *Aluminum Extrusions from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 75 FR 54302 (September 7, 2010) (*Preliminary Determination*).

<sup>8</sup> See *MacLean-Fogg Co. v. United States*, 853 F. Supp. 2d 1253, 1256 (CIT 2012) (*MacLean-Fogg II*).

<sup>9</sup> *Id.*

<sup>10</sup> See *MacLean-Fogg Co. v. United States*, 853 F. Supp. 2d 1336, 1338 (2012) (*MacLean-Fogg III*).

indicating that the rate calculated for the mandatory respondents was logically connected to the all-others companies because the mandatory respondents comprised a significant portion of the PRC extruded aluminum producers and exporters, and thus were representative of the PRC extruded aluminum industry as a whole.<sup>11</sup> The CIT held that “nothing in the statute requires that the mandatory respondents’ rates, even when based on AFA, may only be used to develop rates for uncooperative respondents.”<sup>12</sup> However, in *MacLean-Fogg III*, the CIT also concluded that the Department failed to explain how the calculated all-others rate was remedial and not punitive when it assumed use of all subsidy programs identified in the investigation.<sup>13</sup> Therefore, the CIT remanded again to the Department for re-consideration of the issue.<sup>14</sup>

In the second results of redetermination pursuant to remand issued in this litigation, the Department designated the all-others rate as equal to the preliminary rate it calculated for the mandatory respondents, *i.e.*, 137.65 percent.<sup>15</sup> In *MacLean-Fogg IV*, the CIT affirmed the Department’s remand results, holding that the Department’s selection of this all-others rate was reasonable.<sup>16</sup>

The CIT’s holdings were appealed to the CAFC. On June 3, 2014, the CAFC held that section 351.204(d)(3) of the Department’s regulations, which directs the Department to exclude voluntary respondents’ rates from its calculation of the all-others rate, was inconsistent with the statute.<sup>17</sup> Accordingly, the CAFC held that the Department must include rates calculated for voluntary respondents in determining an all-others rate.<sup>18</sup> As the Department had not used the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, at 1341.

<sup>13</sup> *Id.*, at 1342 – 1343.

<sup>14</sup> *Id.*, at 1343.

<sup>15</sup> See *Final Results of Redetermination Pursuant to Court Remand*, dated September 13, 2012, available at <http://enforcement.trade.gov/remands>.

<sup>16</sup> See *MacLean Fogg Co., et al. v. United States*, 885 F. Supp. 2d 1337 (CIT 2012) (*MacLean Fogg IV*) at 11-12.

<sup>17</sup> See *MacLean-Fogg Co. v. United States (CAFC)*, 753 F.3d 1237 (Fed. Cir. 2014).

<sup>18</sup> *Id.*, at 1245.

rates calculated for the voluntary respondents in the underlying investigation to determine the all-others rate, the CAFC therefore held that the Department was required to recalculate the all-others rate using the voluntary respondents' rates. The CIT subsequently remanded the issue to the Department for reconsideration in light of the CAFC's holding.<sup>19</sup>

On remand, the Department recalculated the all-others rate using a simple average of the voluntary respondents' rates.<sup>20</sup> Section 705(c)(5)(A)(i) of the Act provides that, in general, the all-others rate "shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated...." However, the Department explained in the *Third Remand Results* that the use of a weighted average would have revealed the proprietary information of the voluntary respondents to each other.<sup>21</sup>

Petitioners<sup>22</sup> argued that the Department should have requested publicly ranged versions of proprietary data on the record from the voluntary respondents to use in its calculation of the all-others rate, but in the *Third Remand Results*, the Department instead calculated the all-others rate using a simple average of the rates of the two voluntary respondents, which resulted in a rate of 7.42 percent.<sup>23</sup>

After considering the *Third Remand Results*, the CIT remanded to the Department the all-others rate calculation, explaining that the "statute unequivocally and without exception requires that the Department base the all-others rate on the weighted average of individually-investigated non-zero, non-*de minimis*, non-AFA rates."<sup>24</sup> Furthermore, the CIT emphasized that 19 CFR 351.304(c)(1) requires all proprietary information "to be accompanied by public versions 'in

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<sup>19</sup> See *MacLean-Fogg Co. v. United States*, 32 F. Supp. 3d 1358 (CIT 2014) (*MacLean-Fogg V*).

<sup>20</sup> See *Final Results of Redetermination Pursuant to Court Remand*, dated March 17, 2015 (*Third Remand Results*) at 6, available at <http://enforcement.trade.gov/remands>.

<sup>21</sup> *Id.*

<sup>22</sup> Petitioners are the Aluminum Extrusions Fair Trade Committee.

<sup>23</sup> See *Third Remand Result*.

<sup>24</sup> See *MacLean-Fogg Remand Order*, at 21.

sufficient detail to permit a reasonable understanding of the substance of the information.”<sup>25</sup>

The CIT thus directed the Department on remand to either request the publicly ranged data from the voluntary respondents, or publicly range the companies’ information itself, and reconsider its determination to use a simple average of their subsidy rates.<sup>26</sup>

The Department requested and received from the voluntary respondents (*i.e.*, Guang Ya Companies and Zhongya Companies) their publicly ranged sales value and volume data for exports of subject merchandise to the United States during the 2009 investigation period. Using that data, the Department calculated a weighted-average all-others subsidy rate of 7.37 percent.<sup>27</sup> In accordance with the *MacLean-Fogg Remand Order*, the Department reconsidered its decision to rely on the simple average of the voluntary respondents’ rates in determining the all-others rate.<sup>28</sup> Specifically, because the subsidy rate determined based on the publicly ranged data, rather than the subsidy rate determined based on a simple average, is closer to the subsidy rate that would have resulted from weighting the voluntary respondents’ rates based on proprietary sales values, the Department revised the all-others rate to 7.37 percent in its *Final Remand Results*.<sup>29</sup>

On October 23, 2015, in *MacLean Fogg Remand Order*, the CIT affirmed the Department’s *Final Remand Results*, upholding that the Department’s all-others rate of 7.37 percent.<sup>30</sup>

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<sup>25</sup> *Id.*, at 30.

<sup>26</sup> *Id.*, at 31.

<sup>27</sup> See *Final Results of Redetermination Pursuant to Court Remand*, dated October 15, 2015 (*Final Remand Results*), available at <http://enforcement.trade.gov/remands>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *MacLean Fogg Co., et al. v. United States*, Slip Op. 15-119, Court No. 11-00209 (October 23, 2015).

### Amended Final Determination

Because there is now a final court decision with respect to the *Final Determination*, the Department amends its *Final Determination*. The following revised net subsidy rate exists:

Company	Subsidy Rate
All-Others	7.37 percent <i>ad valorem</i>

For companies subject to the all-others rate, the cash deposit rate will be the rate listed above and the Department will instruct U.S. Customs and Border Protection accordingly. This notice is issued and published in accordance with sections 705(d) and 777(i)(1) of the Act and consistent with the clarification in *Diamond Sawblades*.

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Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

November 4, 2015\_

Date

[FR Doc. 2015-28668 Filed: 11/9/2015 8:45 am; Publication Date: 11/10/2015]